No. 93-289

# In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL.,
PETITIONERS

*v.*

ARLEN SPECTER, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

Respondents premise much of their brief on the notion that allegations of procedural error by the Defense Base Closure and Realignment Commission and the Secretary of the Navy are fully equivalent to allegations of constitutional error by the President. Respondents acknowledge (Resp. Br. 13-14) that in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992), this Court held that the nonbinding recommendation of an agency to the President is not "final agency action" reviewable under the Administrative Procedure Act (APA), 5 U.S.C. 704, and that the President is not an "agency" subject to the APA's judicial review provisions. But seizing on the Court's statement that "the President's actions may still be reviewed for constitutionality" (112 S. Ct. at 2776), they contend that when the President "exceeds the scope of his *statutory or* constitu-

tional powers," he automatically violates constitutional principles of separation of powers. Resp. Br. 15 (emphasis added).

That theory—which respondents advance for the first time in this Court (see Gov't Br. 19-20 n.12)—rests on premises that cannot be sustained under the particular provisions of the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. 2687 note (Supp. IV 1992), or under general principles of judicial review prescribed by the APA. First, respondents err in contending (Resp. Br. 20-22) that Congress conditioned the President's discretion to accept or reject the Commission's recommendations upon his verification that they were formulated free of any procedural error. Second, respondents conflate (*id.* at 15-19, 24-25) concepts of constitutional and statutory error, advancing the novel theory that judicial review must always be available to test the President's compliance with a statute Third, respondents misread (*id.* at 29-32) *Franklin*, by arguing that the Commission's recommendations are "final" even though they are without binding effect unless the President certifies his approval of them to Congress. Finally, respondents fail to acknowledge (*id.* at 32-45) the powerful evidence of Congress's intent to preclude judicial review of base closure decisions.

1. Respondents' theory of judicial review (as reformulated in this Court) rests on the theory that the President acted ultra vires his authority under the 1990 Act by approving the Commission's 1991 base closure recommendations. Echoing the court of appeals' reasoning (Pet. App. 12a), respondents argue (Resp. Br. 20-22) that the Act divests the President of authority to approve the Commission's recommendations if the Secretary of Defense or the Commission failed to comply with any of the Act's procedural requirements.

As we have explained (Gov't Br. 26-28), that contention reflects a misapprehension of the scheme adopted by Congress. Respondents point to no provision of the 1990 Act that limits the President's discretion to accept or reject the Commission's recommendations. The provision setting forth the President's powers and responsibilities merely provides that the President "shall, by no later than July 15 * * *, transmit to the Commission and to the Congress a report containing the President's approval or disapproval of the Commission's recommendations." § 2903(e)(1). Nowhere in that provision, or in any other provision of the Act, has Congress limited the President's facially unqualified authority to "approv[e] or disapprov[e]" the Commission's recommendations. As Judge Alito explained in his dissent below, nothing in the 1990 Act suggests either "that the President, upon receiving the Commission's recommendations, must determine whether any procedural violations occurred at any prior stage of the statutory process," or "that [he] must reject the Commission's package of recommendations if such procedural violations come to his attention." Pet. App. 23a.

Respondents' contrary view simply cannot be squared with the court of appeals' determination that "the decision on which bases to close is committed by law to presidential discretion." Pet. App. 46a. Nor can it be reconciled with respondents' own assertion (Resp. Br. 30) that the 1990 Act "does not give the President either the time or the resources to determine whether [the Secretary and the Commission] complied with the Act's procedural mandates" (footnote omitted). Under respondents' reading of the 1990 Act, Congress denied the President the ability to determine the existence of procedural errors, while stripping him of authority to act unless he does so.[1]

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[1] Respondents argue (Resp. Br. 21) that the President "receives nothing from the Commission upon which he has statutory authority to act" if the Secretary or the Commission committed a procedural error concerning a single base. Under that interpretation, because the President must accept or reject all of the proposed closures as a single package (§ 2903(e)(2) and (4)), any procedural violation could preclude the entire round of base

2. More fundamentally, respondents' position in this Court rests on the supposition that every agency violation of a non-discretionary procedural requirement renders its ultimate decision ultra vires—and, indeed, unconstitutional. See Resp. Br. 23. That argument errs in two respects.

a. First, as we explain in our opening brief (Gov't Br. 24-26), an official does not act ultra vires simply by committing an error in implementing his authority; rather, ultra vires conduct occurs only if an official acts on a matter as to which he lacks authority "to make a decision at all." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.12 (1949). This Court has explicitly rejected the view that "every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986); see also *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 506-507 (1993); *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717-719 (1990); Gov't Br. 29-30. Where a statute does not specify that a procedural error disables an official from acting, that consequence should not be implied. *Montalvo-Murillo*, 495 U.S. at 717; *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872); *Good Real Property*, 114 S. Ct. at 506.[2] Nothing in the 1990 Act specifies or

closures. Nothing in the 1990 Act's text or legislative history suggests that Congress intended that anomalous result.

[2] That conclusion is supported by the D.C. Circuit's decision in *American Airlines, Inc.* v. *CAB*, 348 F.2d 349 (1965) (Burger, J.), a case on which respondents heavily rely (Resp. Br. 22-23). Under the statute at issue there, the Civil Aeronautics Board (CAB) issued orders recommending overseas air transportation certificates to the President, who had discretion to approve or disapprove them. *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948). In *Waterman*, this Court held that the CAB's orders were not ripe for judicial review until the President had approved them, and that the President's decision to approve such orders was unreviewable. *Id.* at 114. In *American Airlines*, the D.C. Circuit held that judicial review was nevertheless available where the complainant alleged that the Board had made a recommendation in excess of its statutory authority. 348 F.2d at 352-353.

For two reasons, *American Airlines* does not assist respondents here. First, the statute under which the CAB issued orders explicitly contemplated that such orders would be subject to judicial review, and *Waterman* adopted an implied exception to that provision for matters involving the President's discretion. 333 U.S. at 106. In contrast, the 1990 Act contains no provision authorizing judicial review of the Commission's recommendations, and *Franklin* establishes that those recommendations do not constitute "final agency action" (5 U.S.C. 704) subject to review under the APA. Second, *American Airlines* explicitly distinguished claims of ultra vires conduct from claims of procedural error, holding that the latter were unreviewable because they merely "go to the correctness of the award." 348 F.2d at 352; see *id.* at 353 (no jurisdiction of "an attack on the [agency's] *procedures* in making and rendering its decision") (citing *United States Overseas Airlines, Inc.* v. *CAB*, 222 F.2d 303 (D.C. Cir. 1955)).



even suggests that the Secretary or the Commission, much less the President, is disabled from acting if there has been any form of procedural error at any step in the process.

b. Second, even assuming that procedural violations on the part of the Secretary and the Commission would amount to ultra vires conduct, respondents have failed to state a claim that the President violated the Constitution by approving the Commission's recommendations. See Gov't Br. 30-31. *Franklin*'s recognition of the availability of judicial review for constitutional claims is therefore inapplicable here.[3]

[3] Contrary to respondents' contention (Resp. Br. 20 n.20), *Franklin* considered the constitutional issue in the context of a claim against the Secretary of the Commerce, not the President. 112 S. Ct. at 2767. Respondents similarly allege that procedural errors were committed by the Secretary of Defense and the Commission. But an agency's violation of procedural requirements does not in itself violate the Constitution; only where the procedures were themselves required by the Constitution does a violation raise a constitutional question. See, *e.g.*, *United States* v. *Caceres*, 440 U.S. 741, 751-752 (1979). There is no basis for a different rule where the dispositive action is by the President himself, rather than by a subordinate of-

Respondents argue (Resp. Br. 24-25) that judicial review of the President's compliance with the law is a form of constitutional review under the separation-of-powers doctrine. Under respondents' view, all claims that an Executive official exceeded his statutory authority would be reviewable as constitutional claims outside the confines of the APA. The cases on which respondents rely, however, have not equated statutory claims with constitutional claims. Rather, they have involved either independently cognizable constitutional rights or allegations that ultra vires conduct stripped a government officer of immunity from personal liability for the wrongful invasion of rights protected at common law.

For example, respondents rely heavily (Resp. Br. 14-15) on *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), which approved injunctive relief against the Secretary of Commerce to prevent seizure of the Nation's steel mills pursuant to a Presidential order. *Youngstown*, however, does not hold that whenever the President exceeds his statutory authority, he violates the Constitution. See Gov't Br. 32-34. Because the government in *Youngstown* disclaimed any reliance on statutory authority and asserted inherent constitutional power to seize the mills, the sole question was whether the President's order was within his constitutional authority. 343 U.S. at 584, 587-588. Moreover, the plaintiff steel mill owners alleged that the President had invaded their property rights, which were independently protected by the common law and the Fifth Amendment. Here, by contrast, respondents—elected officials and shipyard workers—have no personal rights protected by either the Constitution or the common law with respect to base closures.

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ficial. It could not plausibly be contended that the 1990 Act's procedures for closing military bases are required by the Constitution or that a violation of those procedures violates the Constitution.



Similarly, respondents err (Resp. Br. 15) in reading *Franklin* for the broad principle that judicial review is necessarily available "where the President exceeds the scope of his *statutory or* constitutional powers" (emphasis added). While the plaintiffs in that case raised a statutory claim under the Census Act (see Gov't Br. 21 n.13), this Court confined its review to their distinct claim directly under the Census Clause of the Constitution, Art. I, § 2, Cl. 3. See 112 S. Ct. at 2777-2779. Hence, *Franklin* offers no support for respondents' position that allegations of conduct in excess of statutory authority automatically require judicial review.

Finally, respondents misread (Resp. Br. 15, 18, 25) cases in which plaintiffs alleged ultra vires conduct as a means of stripping government officers of immunity from suits alleging the invasion of protected common law rights. Thus, in *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170 (1804), this Court sustained an award of damages for a "plain trespass" (*id.* at 178) that had occurred when a United States naval officer seized a neutral vessel. The officer raised as a defense a Presidential order authorizing the seizure, but this Court held that the President's order was unauthorized by the relevant statute and therefore could not "legalize" the seizure. *Ibid.* Thus, *Little* v. *Barreme* at most establishes that when a federal court has jurisdiction to hear a common law claim, it may review the statutory basis for a Presidential order that is asserted as a defense. It does not stand for the distinct proposition that the Constitution intrinsically provides a cause of action for federal conduct in excess of statutory authority.[4]

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[4] Other cases relied on by respondents (Resp. Br. 25) are of similar import. Thus, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912), was an action to enjoin a federal officer from invading the property rights of the plaintiff. The question of ultra vires conduct arose because federal sovereign immunity "does not protect * * * officers from personal liability to persons whose rights they have wrongfully invaded," and the question of wrongfulness turned on whether the officer was "acting in excess of his authority or

Of course, the allegation that a federal officer has exceeded his statutory authority may itself give rise to a judicially cognizable claim for relief, but only if Congress has created an appropriate cause of action.[5] Respondents argue (Resp. Br. 24-25), however, that judicial review is required for both statutory and constitutional claims against the President. That contention is misplaced. First, *Franklin* explicitly distinguished constitutional claims from nonconstitutional claims. See 112 S. Ct. at 2776. Second, in *Davis* v. *Passman*, 442 U.S. 228, 241 (1979), this Court recognized that "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is

under an authority not validly conferred." *Id.* at 619-620; see also *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 110 (1902) (where post office official withholds mail without statutory authority, "he thereby violates the property rights of the person whose letters are withheld"); *Dames & Moore* v. *Regan*, 453 U.S. 654, 667, 672 n.5, 688-690 (1981) (challenge to Treasury regulations and Executive Orders alleged to have invaded property interests in final judgments and attachments). Moreover, in *Dakota Central Tel. Co.* v. *South Dakota ex rel. Payne*, 250 U.S. 163 (1919), cited by amicus Public Citizen (Pub. Cit. Br. 16), this Court considered whether the President was acting within his authority in taking over a state telephone system during war time. That issue arose in a lawsuit seeking to enforce state-imposed rates against the telephone company, and the question of ultra vires conduct arose because the company defended its noncompliance with state rates by asserting that the federal government had validly taken control of its operations. 250 U.S. at 180-187.

[5] By contrast, the controversy in this case turns exclusively on whether the 1990 Act authorizes the closure of the Philadelphia Naval Shipyard, and the court of appeals explicitly determined (Pet. App. 69a) that respondents lack any property interest in the Shipyard's continued operation. Although respondents imply (Resp. Br. 26) that our position in this case would make separation-of-powers claims nonjusticiable, we have argued merely that respondents have failed to identify any cause of action relating to the separation of powers, but rely on the naked assertion that the President has acted in excess of his *statutory* authority.



protected by the Constitution." The Court explained (*id.* at 241-242 (citations omitted)):

> Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner.
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> * * * * *
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> [In contrast,] [a]t least in the absence of a "textually demonstrable constitutional commitment of [an] issue to a coordinate political department," we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

When a party wishes to sue a federal agency for exceeding its statutory powers, a cause of action is typically afforded by the judicial review provisions of the APA,[6] provided that the statutory prerequisites to suit are met. The APA's judicial review provisions, however, apply to "final agency action" (5 U.S.C. 704), and *Franklin* clearly establishes that the President is not an "agency" for purposes of the APA. 112 S. Ct. at 2775-2776. Consequently, when a plaintiff pursues a statutory challenge to a decision by the President, he must identify some other statutory source for his right of action.[7] Here,

[6] The APA authorizes judicial review of the claim that an agency acted "in excess of statutory * * * authority." 5 U.S.C. 706(2)(C).

[7] In *Carl Zeiss, Inc.* v. *United States*, 76 F.2d 412 (C.C.P.A. 1935) (Resp. Br. 21-22), the Court of Customs and Patent Appeals held that the President had no authority to issue a tariff proclamation under the Tariff Act of 1930

respondents have not claimed that any statute other than the APA provides authority for their suit. Moreover, as we explain below (see pp. 14-20, *infra*), the text, structure, and history of the 1990 Act show that it precludes judicial review of base closure decisions.[8]

3. Respondents contend (Resp. Br. 29-30) that the Commission's recommendations themselves constitute "final agency action" for purposes of the APA, 5 U.S.C. 704. They argue (Resp. Br. 29) that the 1990 Act does not allow the President to "ignore, revise or amend" the Commission's report, but instead "only" permits him to approve or reject the report in its entirety. That feature of the Act is irrelevant to the finality issue, because it does not alter the consideration deemed crucial in *Franklin*: that the Commission's report "has no direct effect" until "the President takes affirmative steps" to approve the report and certifies his approval to Congress. 112 S. Ct. at 2774. The fact that the President may only accept or reject the report as a whole does not render it "final" for APA purposes; in fact, in evaluating the census scheme at issue in

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in the absence of an adequate prior notice by the Tariff Commission. Although the Tariff Commission, like the Base Closure Commission, merely issued recommendations for the President's approval, the Tariff Act, unlike the 1990 Act, explicitly authorized judicial review of all orders underlying a customs assessment. See 19 U.S.C. 1515 (1958).

[8] Relying on *Leedom* v. *Kyne*, 358 U.S. 184 (1958), respondents also argue (Resp. Br. 27) that there is general authority (aside from the APA) for courts to review claims of ultra vires governmental conduct. But this Court has explicitly rejected the notion that *Leedom* "authoriz[es] judicial review of any agency action that is alleged to have exceeded the agency's statutory authority." *Board of Governors* v. *MCorp Financial, Inc.*, 112 S. Ct. 459, 465 (1991). Rather, *Leedom* "stands for the familiar proposition that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 466 (internal quotation marks omitted). *Leedom* therefore addresses whether Congress has precluded review; it does not suggest that judicial review must always be available for claims of statutory violation.



*Franklin*, this Court expressly rejected the argument that the census report of the Secretary of Commerce was "final" because of the "admittedly ministerial nature of the apportionment calculation" made by the President prior to transmitting the census report to Congress. *Id.* at 2775. Here, of course, the approval by the President, as Commander-in-Chief, of the closure of a number of military bases is scarcely ministerial. In any event, what is crucial, for purposes of finality under the APA, is that only "the President's personal transmittal of the report to Congress" can "settle[]" (*ibid.*) the matter of base closure.

Amicus Public Citizen argues that the actions of the Secretary, as well as those of the Commission, constitute "final agency action." In particular, it urges (Pub. Cit. Br. 7-10) that a contrary conclusion would contravene the APA's strong presumption in favor of reviewability of agency action. This Court, however, typically invokes the presumption of reviewability when it is evaluating the contention that in a particular statutory scheme, Congress intended to preclude review of agency action that is otherwise reviewable. See, *e.g.*, *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670-673 (1986); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 139-141 (1967). Application of that presumption presupposes the existence of reviewable "final agency action" (see, *e.g.*, *Abbott Laboratories*, 387 U.S. at 140 ("judicial review of a *final* agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress") (emphasis added)); this Court has never held that the APA's presumption of reviewability excuses the absence of finality or other explicit prerequisites of judicial review under the APA itself.

Public Citizen also argues (Pub. Cit. Br. 14) that the finality requirement of the APA is designed exclusively to avoid premature interference with agency decisionmaking processes, and that finality attaches whenever an agency "has

taken all the steps it must take to finalize its decision with respect to the particular action that is challenged."[9] That contention, however, is foreclosed by *Franklin*, which held that APA review of the census report prepared by the Secretary of Commerce was unavailable even though the Secretary's role in the reapportionment process had been completed. 112 S. Ct. at 2773-2776.[10] As the Court in *Franklin* made clear, the existence of "final agency action" turns not only upon "whether the agency has completed its decision-making process," but also upon "whether the result of that

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[9] Public Citizen argues (Pub. Cit. Br. 14-15) that procedural claims become ripe for review as soon as the agency omits to take an action required by statute. That contention, however, misapprehends the APA's distinct cause of action to compel "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). Section 706(1) addresses circumstances in which the agency has wrongfully failed to act; it does not transform every alleged failure to comply with a procedural requirement of a statute into "final agency action" subject to immediate review. In fact, the APA explicitly contemplates that "[a] preliminary, *procedural*, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. 704 (emphasis added). In other words, a procedural action by an agency merges into—and is reviewable only as an aspect of—the "final agency action." Where, as here, there is no "final agency action" that is subject to judicial review, the antecedent procedural action remains unreviewable as well. Thus, far from treating procedural actions as inherently "final," the APA explicitly distinguishes such actions from "final agency action."

[10] In trying to recast the "final agency action" requirement as a ripeness requirement, Public Citizen argues (Pub. Cit. Br. 21) that *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130 (1992), rather than *Franklin*, supplies the "correct approach" to judicial review of procedural claims. Although *Defenders of Wildlife* establishes that a litigant may challenge procedural errors without showing that the errors affected the substantive agency action (*id.* at 2142-2143 n.7), that ruling deals with Article III standing, not "final agency action" under 5 U.S.C. 704. In *Defenders of Wildlife*, the plaintiffs challenged an agency rule, which of course was "final agency action," even though the plaintiffs did not have standing to challenge it.



process is one that will directly affect the parties." *Id.* at 2773. Public Citizen's test for finality wholly ignores the second element of "final agency action" prescribed by *Franklin*.[11]

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[11] Public Citizen also maintains (Pub. Cit. Br. 24-25) that our view of the APA's finality requirement would preclude judicial review of compliance with statutes such as the Freedom of Information Act, 5 U.S.C. 552, and the Government in the Sunshine Act, 5 U.S.C. 552b. Both statutes, however, explicitly provide for judicial review to ensure agency compliance (see 5 U.S.C. 552(a)(4)(B), 552b(h)(1)), and the APA authorizes judicial review of "final agency action" *or* "[a]gency action made reviewable by statute." Public Citizen similarly points (Pub. Cit. Br. 24) to the requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1 *et seq.*, and contends that under *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440 (1989), a failure to comply with FACA results in final agency action at the moment of the omission. To be sure, this Court in *Public Citizen* reviewed the question whether the Department of Justice must comply with FACA in recommending judicial nominees to the President. Even assuming that the applicability of FACA, *vel non*, is reviewable under the APA's provision authorizing judicial review to compel "agency action unlawfully withheld" (5 U.S.C. 706(1)), failure to comply with FACA does not invalidate the end result of the agency process to which the advisory committee was to contribute. See *National Nutritional Foods Ass'n* v. *Califano*, 603 F.2d 327, 336 (2d Cir. 1979) (Friendly, J.). Thus, even if FACA provided an appropriate analogy to the very different scheme of the 1990 Act, respondents would not be entitled to invalidate the base closure decision in this case.

Finally, Public Citizen contends (Pub. Cit. Br. 25-28) that our approach to finality would foreclose judicial review of claims under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332, relating to an agency's proposal of legislation. Because NEPA does not itself create a private right of action, judicial review of compliance with NEPA must rest on the APA, and the availability of judicial review therefore presumably turns on the existence of "final agency action." *Public Citizen* v. *U.S. Trade Representative*, 5 F.3d 549, 551 (D.C. Cir. 1993), cert. denied, No. 93-560 (Jan. 10, 1994). Public Citizen argues (Pub. Cit. Br. 26), that if that understanding of finality were correct, Congress would have had no reason to exempt the base closure process from NEPA because judicial review of NEPA claims relating to the base selection process would have been

4. Respondents argue (Resp. Br. 32-44) that Congress did not intend to preclude judicial review of the base selection decision under the 1990 Act. They emphasize (*id.* at 3, 27-28, 35) that an explicit purpose of the 1990 Act is to provide a "fair process" for base closures (§ 2901(b)), and suggest that that objective compels the availability of judicial review. Respondents, however, conspicuously neglect the remainder of the single purpose described in the very same subsection: to provide "a fair process *that will result in the timely closure and realignment of military installations*." § 2901(b) (emphasis added). As we explain in our opening brief (Gov't Br. 38-48), the structure, purpose, and history of the 1990 Act confirm that judicial review of the selection of bases for closure is incompatible with the latter objective.

a. We disagree with respondents' contention (Resp. Br. 35-36) that the usual presumption of reviewability applies under the 1990 Act because Congress has authorized the President to close a base outside the prescribed process if he "certifies to the Congress that such closure * * * must be implemented for reasons of national security or a military emergency." 10 U.S.C. 2687(c); § 2909(c)(2). The fact that Congress has given the President extraordinary authority to close a particular base for national security reasons in no way eliminates national security considerations from the overall statutory process of selecting bases for closure. A number of provisions of the 1990 Act call for consideration of sensitive questions of military policy in selecting bases for closure (see Gov't Br. 37), and the Act inevitably calls for the exercise of

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unavailable on finality grounds. NEPA, however, imposes procedural requirements on federal agencies; it does not address the subject of judicial review. The 1990 Act accordingly exempts the President, the Commission and the Secretary from complying with NEPA in the base selection process; it does not, as Public Citizen assumes, require compliance with NEPA and merely foreclose judicial review of that compliance.



"the discretion of the Commander-in-Chief concerning the domestic deployment of the [N]ation's military resources." Pet. App. 46a. Thus, the APA's presumption of reviewability is inapposite because of the inevitable role of national security considerations in the determination of base closures. See, *e.g.*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988).

b. Even if the presumption of reviewability were applicable, moreover, the 1990 Act contains "reliable indicator[s]" (*Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984)) of congressional intent to preclude judicial review. In our opening brief (Gov't Br. 38-45), we demonstrate that judicial intervention in the selection of bases for closure would defeat the 1990 Act's purposes of avoiding political maneuvering and ensuring expedition and finality in the process of selecting bases for closure. Respondents do not even attempt to dispute our showing (Gov't Br. 40-41) that judicial review would undermine Congress's decision to give the President and Congress direct responsibility for the base closure decision and require them to act on an indivisible package of base closures that must stand or fall together.

Respondents err in suggesting (Resp. Br. 38) that judicial review would not compromise the 1990 Act's purpose of timeliness and expedition, and that those values would be preserved as long as judicial review is withheld until completion of the base selection process. As demonstrated in our opening brief (Gov't Br. 44-45), the 1990 Act places a firm premium on implementation and expedition after the President and Congress have acted. Section 2904(a) mandates that the Secretary "shall" close all bases identified in the report transmitted by the President to Congress pursuant to Section 2903(e), and Congress imposed a 60-day limitations period for actions brought under NEPA to challenge the post-selection implementation of the base closure decisions. See § 2905(c)(3). If Congress had intended to permit post-selection procedural challenges to base closure decisions, it surely would have im-

posed a comparable limitation; otherwise the period for such challenges would be open-ended. The absence of such a limitation thus further manifests an intent to preclude review. Pet. App. 80a-81a n.16 (Alito, J., concurring in part and dissenting in part).

c. Respondents further contend (Resp. Br. 3, 11, 31) that the absence of judicial review would effectively eviscerate any procedural safeguards built into the 1990 Act. That argument, however, presupposes that statutory requirements will not be observed unless they are judicially enforceable. That premise is contrary to the principle that "the official acts of public officers" are supported by a "presumption of regularity." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14 (1926); see *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). Executive officers must, and are presumed to, observe statutory requirements regardless of their enforceability in court.[12] That presumption of regularity is reinforced here by the fact that the ultimate decision to close bases is vested in the President, a "constitutional officer," *Franklin*, 112 S. Ct. at 2775, who is uniquely accountable for his actions.

In addition, the 1990 Act contemplates that Congress will have a substantial oversight role in the base closure process, thereby helping to ensure compliance by those involved in the

[12] Respondents argue (Resp. Br. 1, 7-8) that petitioners provided inadequate documentation of the base closure decision to the Government Accounting Office (GAO) and held closed meetings in violation of the 1990 Act. In opposing respondents' motion for a preliminary injunction, petitioners explained that after the GAO initially requested fuller documentation of the Navy's base closure decisionmaking process, that documentation was provided. Gov't D. Ct. Opp. to Prelim. Inj. 38-41. Petitioners also explained that the 1990 Act's requirement of public hearings does not preclude the Commission from obtaining information or conducting deliberations in addition to those provided for in such hearings. *Id.* at 42-45. Indeed, some of the respondent elected officials met with Commission staff outside the context of public hearings. *Id.* at 43-44 & n.19.



formulation of the base closure decisions. Respondents argue (Resp. Br. 43-44) that Congress is in no position to ensure the procedural regularity of the selection process. The 1990 Act, however, adopts a variety of mechanisms designed to facilitate substantial congressional oversight. See Gov't Br. 39. The Act requires participants in the base closure process to consult with Congress and keep it apprised of developments in the formulation of base closure recommendations, see § 2903(a)(2), (b)(2), (c)(1), (c)(2) and (d)(3), and it prescribes streamlined procedures for consideration of a joint resolution of disapproval. §§ 2904(b), 2908. There is no reason to assume that Congress will be unable to use those mechanisms to ensure the procedural integrity of the base closure process.[13]

[13] We disagree with respondents' suggestion (Resp. Br. 43) that Congress's role is undermined by the fact that the statute contemplates only two hours for floor debate. The 1990 Act also contemplates that the Committees on Armed Services in the House and the Senate will have up to 20 days to conduct hearings on a joint resolution of disapproval. See § 2908(b) and (c); Pet. App. 43a. In addition, the House debate on the joint resolution of disapproval for the 1991 round of base closures explicitly addressed alleged procedural flaws in the selection of the Philadelphia Naval Shipyard. Gov't Br. 40-41 n.29. Thus, it is not beyond Congress's capacity to consider alleged procedural errors in the base closure process as part of the statutory oversight mechanism. Congress simply determined that the alleged procedural defects, whatever their merit, did not warrant a rejection of the base closure package, including the Philadelphia Naval Shipyard. Respondents argue (Resp. Br. 44) that the efficacy of congressional oversight is undermined by "a sense of the Congress" resolution indicating that the failure to pass a joint resolution of disapproval in 1991 did not reflect the conclusion that the Commission and the Department of Defense had complied with all the statutory requirements of the 1990 Act. That resolution, however, does not suggest that Congress lacks the capacity to consider alleged procedural errors in considering a joint resolution of disapproval under the Act. Moreover, the "sense of the Congress" resolution states that Congress's failure in 1991 to enact a joint resolution disapproving the President's report *is* to be interpreted as "approval of the recommendations issued by the Base Closure Commission." Department of

d. Respondents misapprehend the plain import of the relevant legislative history, asserting (Resp. Br. 39-40) that a key passage in the Conference Report accompanying the 1990 Act indicates only that the base closure process would be exempt from the procedural requirements of Chapter 5 of the APA, and not the judicial review provisions of Chapter 7. The report, however, explicitly states that various actions in the base closure process—specifically "includ[ing]" the "Secretary of Defense's recommendation," the "decision of the President" approving the Commission's recommendations, and "the Secretary's actions to carry out the recommendations of the Commission"—"would not be subject to the rule-making and adjudication requirements [of the APA] *and* would not be subject to judicial review." H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 706 (1990) (emphasis added).

In a related vein, respondents argue (Resp. Br. 40-41) that the Conference Report addresses only judicial review of substantive challenges to the base closing process, not procedural challenges to that process. The Conference Report draws no such distinction; it states without qualification that the actions undertaken during the base closure selection process "would not be subject to judicial review." H.R. Conf. Rep. No. 923, *supra*, at 706.

The legislative history also strongly indicates that Congress made NEPA inapplicable to the base closure process precisely because it sought to eliminate a source of delays in and ultimate frustration of the closure of domestic military bases. See Gov't Br. 3, 43-44. Respondents argue (Resp. Br. 34, 42-43), however, that Congress's explicit exclusion of NEPA claims carries with it the negative implication that

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Defense Appropriations Act, 1992, Pub. L. No. 102-172, § 8131, 105 Stat. 1208 (emphasis added).



other procedural claims *are* available under the 1990 Act.[14] But Congress did not address the NEPA issue by foreclosing judicial review of NEPA claims. Congress instead rendered NEPA altogether inapplicable in the base closure setting. § 2905(c)(1). Because Section 2905(c)(1) does not take the form of a foreclosure of judicial review, it carries no implication that judicial review is allowed for procedural claims outside the NEPA context. See also Gov't Br. 43-44.

e. Finally, respondents argue (Resp. Br. 45-48) that if the 1990 Act forecloses judicial review of their procedural claims, the Act is unconstitutional. Respondents claim for the first time that if the 1990 Act precludes judicial review, it would result in an unconstitutional delegation of legislative power. They do not, however, suggest that the 1990 Act fails to provide the participants in the base closure process with an "intelligible principle" to which they must conform—the usual inquiry for purposes of the nondelegation doctrine, *J. W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928)—and they ignore that the 1990 Act addresses a subject that is within the President's inherent constitutional authority as Commander-in-Chief. See *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936). Nor do this Court's precedents "establish the principle that judicial review is essential to sustain a delegation, since the exercise of many validly delegated authorities is statutorily insulated from judicial review." *Synar* v. *United States*, 626 F. Supp. 1374, 1389-1391 (D.D.C.) (per curiam), aff'd on other grounds *sub nom. Bowsher* v. *Synar*, 478 U.S. 714 (1986); see *National Federation of Federal Employees* v. *United States*,

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[14] Respondents miscast the 1990 Act's NEPA provisions, asserting (Resp. Br. 41-42) that "without eliminating NEPA's important goals, Congress simply limited NEPA challenges to a 60-day window." The "60-day window" applies only to NEPA claims involving *implementation* of the President's decision.

905 F.2d 400 (D.C. Cir. 1990) (rejecting nondelegation challenge to prior base closure legislation while holding that base closure decisions are not subject to judicial review). Under respondents' contrary view (Resp. Br. 46-47), every statutory scheme would be unconstitutional to the extent that it precludes judicial review of agency action for purposes of the APA, 5 U.S.C. 701(a).

Further, respondents err in contending (Resp. Br. 46-48) that the preclusion of review raises serious constitutional questions under *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). Although *Webster* states that any attempt to deny any judicial forum for a colorable constitutional claim would raise a serious constitutional question, that case arose in the context of the assertion of a personal, constitutionally protected interest. Respondents have no constitutionally protected interest in the base closure process, and the Constitution does not require that Congress nevertheless furnish them with a cause of action to challenge the President's decision in that process. In any event, we have explained (pp. 5-10, *supra*) that respondents' procedural challenges to the base closure process in this case are not claims of constitutional magnitude. Even if Congress were unable to preclude judicial review of some constitutional claims, Congress may validly preclude judicial review of compliance with its own enactments. See *Davis* v. *Passman*, 442 U.S. at 241 ("Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner.").



## CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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